

1 this accident occurred. However, industry standards generally  
2 are not admissible in this case. However, one of the primary  
3 defense experts in this case, Mr. Cloutier, who worked with  
4 Cincinnati Machine, which is a major competitor to Heim, has  
5 indicated that his company, during the 30 years that he was the  
6 product liability supervisor there, provided gated foot  
7 controls with all of its press brakes. It did not provide  
8 gated controls with any, it did not know of gated foot controls  
9 being provided with punch presses. And the purpose of that was  
10 to prevent inadvertent activation of the machines.  
11 Furthermore, the defense expert in this case has indicated that  
12 there is no evidence, none, in his 25 plus years, 25 or 30  
13 years, that there was any increase in injury due to riding the  
14 foot control, utilizing a gated foot control with a press  
15 brake. And that is in our record.

16 THE COURT: Finally, what do you say about Mr.  
17 Robinson's argument on intended use?

18 MR. HARTMAN: Intended use is exactly what she was  
19 doing. The intended use of that machine was to utilize it as a  
20 punch press to bend, mold and form parts. Furthermore, your  
21 Honor, the record absolutely is clear that the law is clear  
22 that you cannot rely upon subsequent uses of a machine to make  
23 your product safe. And, in addition, it's a known, intended,  
24 expected and foreseeable use, as evidenced by Mr. Cloutier's  
25 testimony, that this product would be utilized at times without

1 point of operation protection. Professor Barnett has indicated  
2 the same.

3 THE COURT: He says foreseeability is no longer in  
4 play in Pennsylvania, that's not a test?

5 MR. HARTMAN: Second generation foreseeability I  
6 believe is out, according to his case. In order to determine  
7 intended use, one must determine the means by which the product  
8 is actually intended to be utilized by people and how it is  
9 used. As the court, as in its example, nobody intends anybody  
10 to get injured. So to say that foreseeability is out, the only  
11 intent is the relevant issue, that would not be accurate. In  
12 this situation, the case that is cited by Mr. Robinson is a  
13 property damage claim.

14 THE COURT: The case today you mean?

15 MR. HARTMAN: Yes. And as the court is aware,  
16 having seen product liability cases in property damage  
17 scenarios, the law is generally viewed much more strict than it  
18 is in personal injury matters, where someone has been injured.  
19 Furthermore, the intended use, and the court specifically says,  
20 if the intended use of the material, in that case was as it's  
21 used as a building product, caused the danger, than it would  
22 have been actual. But here it was because someone brought in  
23 an outside source. Here we have no outside source, we have  
24 intended use. The product as it left the manufacturer had a  
25 defective foot control, an ungated foot control. She was using

1 an ungated foot control --

2 THE COURT: Here's where I have a problem with this  
3 other theory of yours on design identity. I take it that in  
4 order to marry, if you will, the foot control switch with the  
5 rest of the press brake, there was nothing unique -- it wasn't  
6 unique in the sense that only a Heim, excuse me, only a Heim or  
7 Linemaster foot control switch could appropriately fit on  
8 there?

9 MR. HARTMAN: There's no evidence either way, your  
10 Honor.

11 THE COURT: No evidence either way. But your  
12 position that if Heim didn't sell one with a foot brake, with a  
13 foot gate to begin with, Heim could theoretically be liable, to  
14 take an extreme case, 40 years down the road after three  
15 different foot gates had gone through -- after three different  
16 foot pedals had been purchased and utilized, the last of which  
17 without a gate was the one actually causing the injury. Your  
18 theory is that -- your theory is that somehow by virtue of the  
19 initial sale, Heim would have lulled subsequent users into a  
20 false sense of security?

21 MR. HARTMAN: No, your Honor. My position is that  
22 the original design has certain characteristics that make it  
23 dangerous, regardless of whether or not you substitute  
24 component parts that are similar. Now --

25 THE COURT: That's a duty to warn issue, though.

1 That's different than design defect, isn't it. For instance,  
2 if they had a gated switch, if this had a foot gate, you  
3 wouldn't need a warning on the device that said, for instance,  
4 only utilize when your gate is down and is operational. Of  
5 course, there wasn't a gate switch in this particular case  
6 apparently. I'm having a hard time understanding how a  
7 manufacturer, how the overall manufacturer can be liable for a  
8 component part from someone else that is acquired years later  
9 and causes injury, if the original supplier of the product  
10 didn't supply the component part. Unless your theory is a  
11 failure to warn theory?

12 MR. HARTMAN: Your Honor, in all due candor to the  
13 court, it is not a failure to warn theory. But, again, let me  
14 take you back to the Ford. We know tires wear out. So if your  
15 Ford has a Firestone Z rated tire, and it came with the  
16 vehicle, and after you wear your tires out, you go down to the  
17 local Firestone store and buy the exact same tire or maybe  
18 because they've improved on the tire, it's still Z rated and  
19 you put it on your vehicle. And it's found out that because of  
20 the design of the vehicle, a Z rated tire, it does not have  
21 sufficient ability to withstand the forces imposed on it, that  
22 you need for an A rated tire, you could sue Ford for the  
23 injuries you incurred with that replacement tire with the same  
24 characteristics.

25 THE COURT: With all respect, but that's because in

1 those cases you're talking about, the underlying product that  
2 Ford supplied in some form or fashion is a contributing cause  
3 to those tires wearing out, so it doesn't matter what tires on  
4 there?

5 MR. HARTMAN: That's the original design of the  
6 product that includes that. Again, because it's different  
7 sidewall strengths, etc. What we have here is we have a design  
8 of a press brake that includes an ungated foot cover, the  
9 Linemaster. We know that, I believe the record would establish  
10 it would be one of two types, if you would believe Heim's  
11 position on that. And we know we have those same types.

12 THE COURT: Let me hear what he has to say, then  
13 we'll wrap up, thank you.

14 MR. HARTMAN: Thank you, your Honor.

15 THE COURT: Do you have a couple minutes you want to  
16 talk to me?

17 MR. ROBINSON: I do, your Honor, thank you. Just a  
18 couple other points that you had inquired into, I wanted to  
19 give the court the record answers for those. You had asked who  
20 does the specing for the particular press brake, and the answer  
21 that was given was that was Heim. That is belied by the  
22 record. Mr. Mase was specifically asked those questions by Mr.  
23 Hartman on page 51 and 52. The response was that the customer  
24 already has knowledge of what he wants to produce, has  
25 researched that product and has provided a manufacturer, such

1 as Heim or someone else, a typical tonnage, such as 70 ton, a  
2 certain length being a six foot would be the request, it is a  
3 general purpose machine. The question went then so the typical  
4 sales transaction does not involve Heim trying to ascertain  
5 what the press brake is going to be utilized for? The answer  
6 was correct. Then Mr. Hartman asks, a customer makes that  
7 decision and makes the request for Heim as to the size of  
8 tonnage and length of the bed? The answer was correct. There  
9 is no evidence to suggest in this case or in any case that Heim  
10 specked out with any input from the purchaser, HB Machinery,  
11 whose use we have no idea what it was.

12 THE COURT: What is your response to Mr. Hartman's  
13 position that irrespective of his ability to show that it was  
14 the same model that was sold that actually ended up injuring  
15 your client, that he still stays in the ball game because once  
16 a defective design, always a defective design, regardless of  
17 what interim supplier may have supplied a press brake?

18 MR. ROBINSON: So that argument would mean, as your  
19 Honor pointed out, that in perpetually Heim would be  
20 responsible for anyone else's sale, any other defendant's sale  
21 of an ungated foot control, that has never been the law of  
22 Pennsylvania. To use the analogy that if the plaintiff was  
23 utilizing the vehicle, they're talking about some inherent  
24 defect with the vehicle itself such that the tire contributes  
25 to. If the allegation is that the tire is defective, then Ford

1 cannot be liable if they did not in fact sell that tire.  
2 That's what all of our product liability principles go back to,  
3 did you sell the defective product. Or, as your Honor points  
4 out, did you lull someone or instruct someone that you should  
5 only buy a particular part with their product and they did not.  
6 One of the other questions you asked, your Honor, which was  
7 very pointed and you asked is there any testimony about whether  
8 or not this product, that the foot control looked like the old  
9 1978 foot control. Jan Oviatt from Corry Manufacturing, your  
10 Honor --

11 THE COURT: He said it looked like a new one to him,  
12 didn't he, something like that?

13 MR. ROBINSON: He's the person that actually  
14 installed it on the press brake. He said it looked, that he  
15 would be surprised if it was because it was a fairly newer  
16 model and all its labels. And Mr. Hartman asked him on page  
17 66 -- how did he say it, couldn't this be that older product,  
18 and he said no. No, simply because the wear of the machine,  
19 the condition of the machine, compared to the foot pedal. So  
20 the person that actually installed it, said it doesn't look  
21 like it could have possibly been a 1978 vintage foot control.  
22 Just a couple other points. You asked about the yellowish, and  
23 the answer was well, those were from photographs. That is as  
24 inaccurate as you could be. There were two people that  
25 testified as to what the color of the foot brake -- excuse me,

1 that what color of the foot control was that Tina Lindquist was  
2 using at the time. Those two people were plaintiff, who didn't  
3 look at the photograph, she said she thought it was yellow,  
4 that's the plaintiff. The other person was the co-worker, a  
5 Mr. Rooney. He didn't look at the photograph, he said he  
6 recalled it being yellow. So the only testimony that exists  
7 with regard to color were from two people at the plant, one  
8 being the plaintiff them self. The only other point I wanted  
9 to make, your Honor, was that what the plaintiffs are relying  
10 upon is solely Barnett's comment that it looked like a 511. It  
11 looked like a 511. It looked like a 532, because it has the  
12 same exterior housing. That doesn't get them anywhere to show  
13 you that Heim sold the product that she was using. If I might  
14 give you a couple of quotes, your Honor. Matthew Ulmenstine,  
15 who works with Barnett, said, this is on page 66 and 67, "he  
16 has no idea if the plaintiff was using the foot control that  
17 was sold with the machine in 1978." On page 110. "He does not  
18 know what Heim sold in 1978."

19 THE COURT: But in fairness, that wasn't his area of  
20 expertise.

21 MR. ROBINSON: Then let me go to Barnett. And  
22 Barnett said, on page 82, "no one has said that Heim sold the  
23 511." On page 83, "I cannot tell what model came with the  
24 press." On page 85, "I do not know if it even had a gate when  
25 it was sold in '78." And page 91, "there is no evidence that



1 it is the same foot switch." Those are all from Professor  
2 Barnett in his sworn testimony. Then he comes in with an  
3 affidavit after a motion for summary judgment is filed and  
4 somehow attempts to persuade the court that it's the same make  
5 or model or same make and model, despite his prior testimony  
6 and despite his not giving any further indication in his  
7 affidavit as to what he's now relying upon, rather than merely  
8 attempting to defeat the defendant's motion for summary  
9 judgment with a conclusory statement.

10 THE COURT: Thank you. Now, before you folks leave,  
11 let's go off the record here for a second.

12

13 (Discussion held off the record.)

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16 (Whereupon, at 3:18 p.m., the proceedings were  
17 concluded.)

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C E R T I F I C A T E

I, Ronald J. Bench, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.



Ronald J. Bench